

BEFORE THE
BOARD OF REGISTERED NURSING
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MORUFU OLADIPUPO AKINBILE

Registered Nurse License No. 533166,

Respondent.

Case No.: 2007-46

OAH No.: L2006090408

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Registered Nursing as its Decision in the above-entitled matter.

This Decision shall become effective MAY 18, 2008.

IT IS SO ORDERED APRIL 18, 2008.

BOARD OF REGISTERED NURSING
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By LaTranene W Tate

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PROPOSED DECISION

Robert S. Eisman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California, on December 12, 2006; January 31, 2008; February 1, 4 and 5, 2008; and March 10, 11 and 12, 2008.

Anne Hunter, Deputy Attorney General, represented Ruth Ann Terry, M.P.H., R.N. (Complainant).

Femi J. Banjo, Attorney at Law, represented Morufu Oladipupo Akinbile (respondent). Respondent was also present during the hearing.

The matter was submitted on March 12, 2008.

FACTUAL FINDINGS

Jurisdiction

1. On August 25, 2006, Elliot Hochberg, Enforcement Program Manager of the Board of Registered Nursing (board), Department of Consumer Affairs of the State of California, signed and filed the Accusation for complainant, in complainant's official capacity as the Executive Officer of the board.

The Accusation alleged that while respondent worked at Centinela Freeman Regional Medical Center (Centinela Hospital), he inappropriately touched two patients, Anita A. and Dyan W.¹ Complainant charged respondent with unprofessional conduct,

¹ Alleged victims, whether patients or co-workers, are identified by their first names and the first initials of their last names in order to protect their privacy.

pursuant to Business and Professions Code section 2761, subdivision (a)(1); sexual conduct with a patient, pursuant to Business and Professions Code section 726; and violating provisions of the Nursing Practice Act (Bus. & Prof. Code, § 2700 et seq.), pursuant to Business and Professions Code section 2761, subdivision (d).

Respondent filed a Notice of Defense and this hearing ensued.

2. On December 17, 2007, Anne Hunter, Deputy Attorney General, filed a First Amended Accusation for complainant, in complainant's official capacity. The First Amended Accusation alleged that in addition to the two patients in the Accusation, respondent also inappropriately touched a female co-worker, Christina C., but did not add any additional legal cause for discipline.

3. On January 31, 2008, a hearing was held before the Administrative Law Judge to address two motions filed by respondent; Respondent's Demurrer to Accusation and Respondent's Motion to Strike (i.e., to strike the new allegations in the First Amended Accusation). The Administrative Law Judge denied both of respondent's motions in their entirety.

4. On February 1, 2008, at the request of counsel for complainant, the Administrative Law Judge changed the Amended Accusation at page 3, paragraph 10.A., lines 24 and 25, by striking the words "Christina C. was pregnant at the time."

5. Under Business and Professions Code section 2750, the board may discipline any licensee, including a licensee holding a temporary or an inactive license, for any reason provided in Article 3 of the Nursing Practice Act. Under Business and Professions Code section 2764, the expiration of a license shall not deprive the board of jurisdiction to proceed with a disciplinary proceeding against the licensee or to render a decision imposing discipline on the license.

The board has jurisdiction to proceed in this matter.

Licensure

6. The board issued Registered Nurse License No. 533166 to respondent on June 25, 1997. The license was in full force and effect at all times relevant to the charges and allegations in the First-Amended Accusation and will expire on August 31, 2010.

7. Respondent is also licensed to practice nursing in Florida (License No. RN3014512), Georgia (License No. R127781), New Jersey (License No. 26N011020600), and New York (license number is not contained in the record).

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Procedural History

8. Based on the same allegations as contained in the original Accusation, on July 19, 2006, an Ex Parte Suspension Order was issued against respondent, thereby preventing respondent from practicing as a registered nurse. On August 16, 2006, the parties stipulated to continuation of the Ex Parte Suspension Order and to the granting of the board's Petition for Interim Suspension Order (ISO). Administrative Law Judge Vincent Nafarrete's ISO, dated August 18, 2006, continued the suspension of respondent's registered nurse's license "until the final administrative determination of this matter by the Board." The board was to file an accusation within 15 days, hold a hearing within 30 days if respondent files a notice of defense, and issue a decision on the accusation within thirty (30) days after submission of the matter.

9. In issuing the ISO, the Administrative Law Judge concluded that based on complainant's Petition for Interim Suspension Order and accompanying affidavits or declarations, and his findings, complainant "demonstrated by preponderance of the evidence that permitting respondent to continue to engage in the licensed activity of registered nursing would endanger the public health, safety, or welfare."

10. At the commencement of the first day of this hearing (December 12, 2006), the parties stipulated as follows:

- a. to defer opening statements until commencement of the second day of hearing;
- b. to waive the requirement in Business and Professions Code section 494, subdivision (h), that if respondent files a notice of defense in this matter, which he had already done, a hearing will be held within thirty (30) days of the board's receipt of respondent's notice of defense, and that failure by the Office of Administrative Hearings or the board to hold a hearing within 30 days of the board's receipt of respondent's notice of defense, shall not be a ground for dissolving the interim suspension order by operation of law; and
- c. that the ISO and related ex parte order suspending respondent's license shall remain in effect, and that his license shall remain suspended, until the final administrative determination of this matter by the Board of Registered Nursing (i.e., respondent shall not practice or attempt to practice any aspect of nursing in the State of California requiring a nursing license until the board's administrative decision in this matter becomes final, and that he shall not be present for any purpose in any location that is maintained for the purpose of nursing or where nursing is practiced, unless he is a patient himself or visiting a relative in a hospital, and only for that limited purpose, and that he shall not hold himself out as practicing or available to practice nursing).

At the request of respondent and over complainant's opposition, the Administrative Law Judge agreed to continue this matter after the first day of hearing,

until respondent's criminal trial, which was based on the same allegations as the original Accusation, was completed. In consideration of the fact that the Administrative Law Judge continued the matter to a date that had not yet been determined, respondent agreed to waive any future defense or ground for appeal based on laches.

11. On December 29, 2007, a criminal case was filed against respondent. Following an amendment of the charges, respondent was charged with three counts of sexual assault, which are felony offenses. The charges stemmed from respondent's alleged conduct while providing nursing care for two patients while he was employed at Centinela Hospital. On November 9, 2007, following a 15-day trial and jury deliberations, respondent was acquitted on all three counts of sexual assault.

Centinela Hospital

12. Centinela Hospital is a major regional medical center located in Inglewood, California.

13. On or about June 5, 2003, respondent began working at Centinela Hospital as a registered nurse. Respondent acknowledged that, prior to being hired, he had received a copy of Centinela Hospital's Tenet Employment Handbook and Standards of Conduct, which contained "important information about the company's general personnel policies" and about his "privileges and obligations as an employee." In general, Centinela Hospital has a policy prohibiting unprofessional relationships between nursing staff and patients.

14. Under the heading "Sexual and Other Unlawful Harassment," the Centinela Freeman Heath System Employee Handbook states, in relevant part:

[S]exual harassment (both overt and subtle) is a form of employee misconduct that is demeaning to another person, undermines the integrity of the employment relationship, and is strictly prohibited. Anyone engaging in sexual or other unlawful harassment will be subject to corrective action, up to and including termination of employment. Examples of unlawful or sexual harassment include, but are not limited to unwelcome sexual advances, requests for sexual favors, and other verbal, visual or physical conduct of a sexual nature where . . . the conduct has the effect of interfering with an individual's work performance or creating an intimidating hostile or offensive work environment.

Under the heading of "Employee Conduct and Work Rules," the Employee Handbook states, in relevant part:

[T]he facility expects you to follow rules of conduct that will protect the interests and safety of all patients, employees, and the facility. Conduct that is offensive to patients or fellow employees . . . will not be tolerated.

[T]he following are examples of improper or inappropriate conduct that may result in immediate corrective action, up to and including termination of employment:

[¶] . . . [¶]

- Sexual or other unlawful harassment.

Under the heading of “Taking Care of Patients,” the Employee Handbook states, in relevant part:

The patient is entitled to exceptional courtesies and kindness and should be treated accordingly. Please follow these basic rules at all times:

[¶] . . . [¶]

- Patients must be protected at all times from invasion of privacy. Those employees who talk with patients in connection with their job duties should keep their conversation specific, warm and cheerful.

The Employee Handbook rules and guidelines do not generally prohibit a registered nurse from socializing with patients or providing a patient with the nurse’s telephone number. In that regard, the Employee Handbook is specific. Under the heading of “Professional Relationship with Patients,” it states in, relevant part:

You are expected to maintain a professional relationship with patients at all times in order to provide the highest quality of patient care.

The following are examples of types of gross misconduct that can result in corrective action, up to and including termination of employment:

- Knowingly socializing or engaging in sexual activity with prospective, current or former psychiatric or chemical dependency patients, or any member of their family who is or was participating in any family-oriented therapy or treatment.

15. While employed at Centinela Hospital, respondent worked in the Definitive Observation Unit (DOU), which is also known as the “telemetry” ward or unit.

16. During the course of respondent’s employment at Centinela Hospital, the hospital received and investigated complaints it received regarding respondent’s conduct with two patients. As a result, Centinela Hospital elected not to retain respondent. Effective April 26, 2006, the hospital involuntarily terminated respondent’s employment. He was deemed not eligible for rehire based on “inappropriate behavior.”

Although respondent's employment had already been terminated, in a letter dated April 27, 2006, respondent informed the DOU Manager that he decided to resign from his current nursing position.

Co-worker Christina C.

17. The First Amended Accusation alleges that on or about August 20, 2003, while respondent and a female co-worker were in the hospital's break room, respondent "caressed" the co-worker's breast.

18. Christina C., a certified nursing assistant (CNA), started working at Centinela Hospital in the Spring of 2001 and was assigned to the telemetry unit where respondent worked. Christina C.'s duties involved general patient care, which included cleaning and changing patients, taking their vital signs, changing bandages, etc.

19. Between May and August 2003, Christina C. went on maternity leave and returned to work in late August - early September, after the birth of her daughter in June. Prior to going on maternity leave, Christina C. worked with respondent and thought of him as a mentor who encouraged her to go back to school to better herself. She considered respondent a friend and spoke with him all the time.

Upon returning to work after giving birth, Christina C. went back to the telemetry unit, where she worked the 5:00 p.m. to 7:30 a.m. shift with respondent.

20. Each morning, some time between 1:00 a.m. and 3:00 a.m., Christina C. took her 30-minute break in the hospital's break room. Respondent took his break at the same time and would also go the break room. Shortly after Christina C. returned from maternity leave and she and respondent were taking their break together in the break room, they started talking about children and the recent birth of Christina C.'s daughter. During their conversation, Christina C. started showing respondent photographs of her newborn daughter. While viewing the photographs, respondent said words to the affect he wished the child could have been his baby. After making that comment, respondent, who was standing behind Christina C. at the time, reached around and brushed against Christina C.'s breast with his hand, stopping momentarily until Christina C. reacted. *Although respondent did not grab or cup Christina C.'s breast, and the touching was over her clothing (she wore hospital scrubs with a jacket, shirt, and a bra, which had pads inserted because she was lactating at the time),* Christina C. was startled when respondent touched her breast. She was surprised and felt violated. In part, due to the high esteem in which she had held respondent, his conduct hurt her feelings and upset her emotionally. After the incident, respondent left the break room. Christina C. remained in the break room and started crying.

21. Two days after the incident in the break room, Christina C. told respondent's supervisor, Ms. Dessi Danzler, what had happened, but referred to

respondent's act as "grabbing" her breast. Ms. Danzler subsequently had a conference with respondent, during which she informed respondent that he had been accused of grabbing a female co-worker's breast. Respondent denied the allegation and informed Ms. Danzler that he had only given Christina C. "a peck on the cheek while complementing her."

Ms. Danzler memorialized her conference with respondent in a Record of Conference, which was placed in respondent's hospital personnel file. Ms. Danzler wrote that she "counseled [with] employee about work conduct" and informed respondent "to read the policy on conduct." She told respondent that he "should avoid physical contact [with] other employee [*sic*] in the future."

22. After the incident in the break room, Christina C. noticed that respondent's demeanor had changed, in that he stayed away from her. On one occasion, she did not report to work and respondent, who was the acting unit supervisor at that time, called her at home to find out why she was not at the hospital. During their telephone conversation, Christina C. told respondent that she did not appreciate what happened and wanted him to never touch her again. Christina C. testified that in response respondent apologized.

23. Although Christina C. requested that her hospital assignment be changed so that she would not have to work with respondent, her request was denied. Eventually she terminated her employment with Centinela Hospital. Christina C. was uncomfortable working with respondent and was surprised that no further action was taken as a result of her complaint.

24. Christina C. testified that she reported the incident because she came to believe that respondent did not deserve to be a registered nurse and should not be in a hospital with patients. She presented as a very credible witness.

25. No third-party witnesses were identified by respondent or complainant who could independently substantiate or refute respondent's conduct, as alleged by Christina C.

Patient Anita A.

26. The First Amended Accusation alleges that on or about April 3, 2006, while working as a registered nurse at Centinela Hospital, respondent entered a female patient's hospital room, told the patient that he had to check her "private area," and then placed his hand under the patient's hospital gown and inserted two or three of his fingers into her vagina.

27. At approximately 8:00 a.m. on April 2, 2006, Anita A., then a 72 year old female patient was admitted into Centinela Hospital. She had passed out at 6:00 a.m. that morning, while preparing to take a shower. Anita A. had experienced an episode of syncope (i.e., a partial or complete loss of consciousness with interruption of awareness

of oneself and one's surroundings) with symptoms similar to transient ischemic attack (i.e., an episode of cerebrovascular insufficiency). Her medical history included coronary artery disease, requiring two previous coronary artery bypass grafts and numerous angioplasties, hypertension, and chronic heart failure.

At the time of her initial assessment at Centinela Hospital, Anita A. was alert and could ambulate with assistance. Two nurses cared for her during the day.

28. At midday on April 2, Anita A. was awake and voiding regularly into a bed pan. Due to her recent episode of syncope, the nursing staff had initiated and taken "fall precautions." When the day nursing shift was ending, Anita A. was advised to use the call light for assistance and not to get out of bed without help. Hospital records indicate that Anita A. was "forgetful" in that she could not provide information that she should have when asked by hospital staff (e.g., what medication she had been taking).

29. On April 2-3, 2006, respondent was responsible for providing nursing care for Anita A. during the 7:00 p.m. to 7:30 a.m. shift in the telemetry unit. At the start of his shift, respondent found Anita A. to be awake and oriented. Since she was getting out of bed frequently to use the hospital bathroom to urinate, respondent decided to provide her with a Foley catheter. He based his decision on the patient's recent episode of syncope, the fact that she was identified as a "fall risk" patient, that she had been urinating frequently. For her safety, respondent did not want her to have to get out of bed without an escort. Following placement of the Foley catheter, respondent continued to monitor Anita A. At midnight respondent provided Anita A. with medications and at 4:00 a.m. asked her if she wanted a sleeping pill because she was having trouble sleeping. At 5:00 a.m. Anita A. complained that the Foley catheter was causing burning and irritation, so respondent removed it. The last time respondent treated Anita A. was at 7:00 a.m., when she ambulated to the bathroom and voided. All these procedures are well-documented in Anita A.'s medical records.

30. According to Anita A., during the evening of April 2, respondent entered her hospital room and introduced himself as the third shift nurse. Anita A. was alert and oriented and was laying in bed while wearing a hospital gown of some type (there was conflicting testimony regarding the type of gown Anita A. was wearing). Anita A. testified that respondent asked her about her past heart surgeries and procedures and that during their conversation respondent told her that he had to check something. Anita A. said she turned her head away from respondent and respondent then proceeded to place his hand down the front of her hospital gown until he reached her crotch and then inserted one or more of his fingers inside her vagina, causing a sensation that Anita A. described as being "like scratching." She felt as though respondent had inserted three of his fingers into her vagina, up to respondent's knuckles. Anita A. claimed that, after she told respondent to get his "God-damn hands out of there," he immediately removed his hand and walked out of the room.

31. Anita A. was discharged from Centinela Hospital on April 4, 2006. Following the alleged incident on the first night of her stay in the hospital, no other sexually abusive act occurred. Anita A. elected not to inform the hospital staff when the incident occurred because she was "ashamed and afraid."

32. At some time after the alleged incident, Anita A. called her sister and told her that she thought she was sexually abused at the hospital. She also called her daughter, who suggested that she contact her doctor, whose office was across the street from Centinela Hospital. Although Anita A. thought of calling the police, she neglected to do so.

Anita A. subsequently informed her doctor's secretary about what happened at the hospital, which resulted in the incident being reported to Centinela Hospital. Shortly after the incident was reported, a representative from Centinela Hospital visited Anita A. at Westchester Villa, which is an assisted living facility where Anita A. was living. It was not until two or three days after the incident that Anita A. informed investigating police officers about what had happened while she was in the hospital.

33. Certain aspects of Anita A.'s description regarding what happened were confusing and inconsistent with respect to several details.

a. Anita A. referred to being admitted into the Centinela Hospital on April 3, 2006, when she was actually admitted on April 2.

b. Anita A. testified that the hospital gown she was wearing was short-sleeved and open in the front, down to the lower part of her sternum. It was tied in the front with a small string. What Anita A. described was not a typical hospital gown, which is open in the back and covers the patient's chest. Yet again, Anita A. described her hospital gown as having two ties, on each side at the waist line and she had to hold the sides of her gown at chest level so that it would not open up, which it would if she let go. Under further testimony, Anita A. testified that the hospital gown had a V-neck and she was not sure how it was tied.

At the time of incident, Anita A. was supine on the bed and respondent was standing on her right side, near her shoulders. Regardless of which of Anita A.'s descriptions of her hospital gown is correct, it would be awkward for respondent to reach down underneath the front of the patient's gown, from the area of the patient's chest to the patient's vagina.

c. Anita A. also testified that when respondent first entered her hospital room, she could not make out his features because she is almost blind without her glasses, which she at first claimed she did not have on at the time. Although Anita A. did not know respondent's name and could not identify him when shown photographs of possible suspects she was able to generally describe respondent and identified him in the courtroom as the male nurse on the third shift who sexually abused her. Anita A.

subsequently testified that she was unconscious when she was brought to the hospital by ambulance and that, on awaking, she was wearing her glasses. She took the glasses off to talk to her daughter, and then put them back on. Anita A. also stated she was wearing glasses when respondent entered the room.

34. Although Anita A. was not consistent when trying to accurately recall aspects of her stay at Centinela Hospital on April 2-4, 2006, she was consistent in describing what she felt and said to respondent when she sensed that he had penetrated her vagina. However, she neglected to include in her account of what happened the fact that a Foley catheter had been inserted and later removed, at her request, by respondent.

35. The inconsistencies in Anita A.'s recollection of details involving her interaction with respondent during the evening of April 2, 2006, her apparent confusion when trying to establish the timeline for events surrounding the incident, her failure to timely report what had happened and her failure to include the insertion and removal of the Foley catheter by respondent is of concern, in that it tends to compromise the credibility of her account.

36. No third-party witnesses were identified by respondent or complainant who could independently substantiate or refute respondent's conduct, as alleged by Anita A.

Patient Dyan W.

37. The First Amended Accusation alleges that on or about April 19, 2006, while working as a registered nurse at Centinela Hospital, respondent entered a female patient's hospital room and, in spite of the patient's preference for a female nurse, respondent removed a Foley catheter from the patient and then fondled the patient's vagina with his fingers. He later discovered that one of the patient's heart monitor leads had become loose or disconnected and, while searching for the lead under the patient's hospital gown, rubbed the nipples on each of her breasts.

38. On April 17, 2006, Dyan W., a 34 year old female patient, was transported to Brotman Medical Center in Culver City, California, after having a seizure while riding as a passenger in a vehicle. Brotman Medical Center was the closest hospital when the seizure occurred. Due to her medical insurance coverage, the next day Dyan W. was transported to Centinela Hospital, where she was admitted into the Telemetry Unit. On the evening of April 18, while Dyan W. was still in the Telemetry Unit, respondent assumed responsibility for her nursing care.

Although Dyan W. had recurring seizures during the preceding month and had run out of her seizure medication, she was seizure-free during her stay at Centinela Hospital. At the time, Dyan W. was also recovering from aspiration/pneumonia that she may have developed secondary to the most recent seizures.

39. At about 9:00 p.m. on April 19, 2006, respondent and a CNA entered Dyan W.'s hospital room. Respondent introduced himself as the nurse that would be on duty. Although Dyan W. indicated that she would prefer to have a female nurse, she did not initially object to having respondent provide for her nursing care. Respondent told the patient that he would remove the Foley catheter that was inserted while Dyan W. was at Brotman Medical Center, and re-insert an intravenous (IV) needle in her arm.² Respondent and the CNA left the room and respondent later returned alone. When he returned, respondent donned gloves and proceeded to remove the Dyan W.'s catheter. On three or four prior occasions, Dyan W. had catheters removed by nurses, including male nurses, and doctors. However, she never experienced catheter removal in the manner that respondent used. She characterized his removal of the catheter as being non-standard and analogized it to being more like a visit to a gynecologist, in that during the procedure he stuck his gloved finger into her vagina and "fondled" the vagina.³

After removing the Foley catheter, respondent continued tending to Dyan W. by providing her with a new hospital armband and re-establishing IV access in her arm. Respondent also started talking to Dyan W. about personal and family matters, her youthful state and her medical history. The conversation made Dyan W. feel bad because of her medical condition and she started to tear up. In an effort to comfort her, respondent proceeded to stroke her hair and/or face with his hand.

At approximately 11:45 p.m. that evening, respondent returned to Dyan W.'s hospital room, woke her up, and asked her to use the bathroom to urinate. After voiding, Dyan W. returned to bed, at which time respondent noted that one of Dyan W.'s heart monitor leads must have come loose because the graphic display indicated asystole (i.e., a "flat line" non-functioning heart). Respondent told Dyan W. that he would have to adjust the heart monitor lead. He first tried to go through the top of her gown with his ungloved hands but could not reach the lead, so he then attempted to go through the bottom of her gown. While groping for the lead, respondent's hand touched the area around Dyan W.'s left nipple. However, since the lead was further down below her breast, not on her breast, Dyan W. said that she would get the lead and give it to respondent, which she did. After respondent connected the lead, he said that maybe he should check all the leads and proceeded to run his hand all over Dyan W.'s chest, again touching her breasts. After he was finished with the heart monitor leads, respondent moved his right hand to the patient's vagina and began to rub that area. Dyan W. told respondent to stop what he was doing; that she was happily married. He complied with her demand. Following this incident and so that Dyan W. could call him after she was released from the hospital,

² Although IV access had previously been established, Dyan W. accidentally dislodged the needle, which then needed to be replaced.

³ While it was not immediately clear what Dyan W. meant by "fondling" or what she considered to be her vagina, based on a review of her statements, Dyan W. includes as part of the vagina the labium minus, vaginal orifice, and the vagina itself. She also considered vaginal penetration with a finger to be included under the term "fondling."

respondent wrote his personal telephone number and the name "MO" on a piece of paper containing other names and telephone numbers, which Dyan W. had on the table by her hospital bed.

After respondent left the room, Dyan W. waited a few minutes and then called her mother. She cried while telling her mother what respondent had done. At that time, a respiratory therapist asked Dyan W. what was wrong. She told the therapist that she had been molested and asked to speak with the charge nurse. At approximately 2:30 a.m. on April 20, the charge nurse came to Dyan W.'s room. In the interim, Dyan W. and her mother had spoken with the police. Some time after the charge nurse had arrived, Dyan W.'s husband and two male officers from the Inglewood Police Department had also arrived at the hospital room.

Dyan W. spoke with the investigating officers for about 15 minutes. During the interview, she did not mention that respondent actually penetrated her vagina with his finger because her husband was in the room. She was uncomfortable providing that information because they had only recently been married. After speaking with the investigating officers, Dyan W. remained upset and spoke with her husband. The police officers left to find and interview respondent.

40. After notifying the hospital about what had happened, Dyan W. no longer received nursing care from respondent. She was released from the hospital on April 24, 2006.

41. Vincent Baldonado is a peace officer in the Patrol Division of the Inglewood Police Department. At approximately 3:00 a.m. on August 20, 2006, Officer Baldonado and his partner, Officer Le, were dispatched to Centinela Hospital to do a preliminary investigation of reported sexual abuse. Upon arriving at the hospital, Officer Baldonado met with Dyan W. At the time, Dyan W. appeared "confused, more scared and upset." During all or part of the interview, Dyan W.'s husband was present. Dyan W. informed Officer Baldonado that she had a Foley catheter that made her feel uncomfortable so she requested that it be removed. She said that at approximately 9:00 p.m., respondent removed the catheter, during which time he also fondled, i.e., unusually touched, her vagina, but did not insert his finger or fingers, either gloved or ungloved, into her vagina.

Dyan W. also told Officer Baldonado that later in the evening respondent returned to her room, spoke with her and then told her that one of the leads from her heart monitor needed to be adjusted. She said that respondent proceeded to put his ungloved hand under her hospital gown to find the lead and that, while doing so, he rubbed the nipples on her right and left breasts. She also said that respondent then moved his ungloved right hand down to her vagina and began to rub that area. He continued to do so until Dyan W. told him to stop and, afterwards, wrote his personal cellular telephone number and "MO" (short for Morufu) on a piece of paper that Dyan W. had, which contained other names and telephone numbers.

42. After interviewing Dyan W., Officer Baldonado interviewed respondent. Respondent stated that he removed the Foley catheter from Dyan W. at 7:45 p.m., as instructed pursuant to the patient's medical chart. He stated that he was assigned to remove the catheter and it was not hospital policy that a female nurse had to be present during that procedure. He also told Officer Baldonado that at about 11:45 p.m. that evening, he returned to Dyan W.'s room and told her she needed to urinate in the bathroom to make sure there were no complications from the catheter removal. He said that Dyan W. went to the bathroom, closed the door, urinated and then returned to bed. After Dyan W. returned to bed, he noticed that leads from the patient's heart monitor needed adjustment, so he reached under her gown and clipped the cords back in place. Although respondent admitted that he was not gloved at the time, he denied touching Dyan W.'s breasts. Respondent also admitted that it was not common practice for a nurse to give a patient his or her personal telephone number.

43. Respondent noted that when Dyan W. was admitted at Centinela Hospital, she was classified as a fall risk and had tested positive for marijuana during a drug abuse urinalysis screening that was completed at Brotman Medical Laboratories on April 17, 2006. However, there is no indication that the positive results from the urinalysis meant that Dyan W.'s ability to perceive the treatment she received from respondent on April 18-19, 2006, was altered.

44. No third-party witnesses were identified by respondent or complainant who could independently substantiate or refute respondent's conduct, as alleged by Dyan W.

45. Dyan W. testified that she does not know Anita A. or had ever spoken with her. Dyan W. presented as a credible witness.

Hospital Investigation

46. Margaret Pfeiffer has been a registered nurse since 1990 and currently works as the vice president of patient care services at St. John's Health Center in Santa Monica, California.

47. Beginning in August 2001 Ms. Pfeiffer was employed by Centinela Hospital, where she eventually became the nursing director for the Cardio-vascular Intensive Care Unit and DOU. She held those positions for six months, then became the Assistant Chief Nursing Officer and, in January 2006, became the hospital's Chief Nursing Officer. As the Chief Nursing Officer, Ms. Pfeiffer was responsible for administrative oversight of nursing care services and insuring hospital policies pertaining to nursing care were within the standard of practice.

48. While she was the nursing director for DOU, Ms. Pfeiffer had an opportunity to observe respondent, whom she described as a hard worker and a team player with a good work ethic.

49. Following the incident reported by Dyan W., which was investigated by Centinela Hospital's Risk Manager, Ms. Pfeiffer completed a board complaint form, wherein she noted that respondent inappropriately touched Dyan W. and had given her his telephone number. A decision to terminate respondent's employment was based on the hospital's investigation, which found Dyan W.'s allegations to be credible. Ms. Pfeiffer also referenced a subsequent complaint regarding respondent that was made by Anita A. Ms. Pfeiffer signed the form on May 5, 2006, and it was received by the board on July 31, 2006.

50. Ms. Pfeiffer opined that if a registered nurse gives a patient his personal telephone number, such conduct would be contrary to hospital expectations; it would not be customary and crosses the professional boundary between a nurse and a patient. Such conduct is generally described in those portions of the Employee Handbook that refer to professional behavior and relationships with patients and co-workers. However, the Employee Handbook does not explicitly prohibit providing a personal telephone number to a patient.

Inglewood Police Department Investigation

51. Since Centinela Hospital is located in the city of Inglewood, jurisdiction for investigating alleged crimes in the hospital would generally rest with that city's police department.

52. Sherry Rumsey is a detective with the Inglewood Police Department. She has been a peace officer for 20 years and currently investigates matters involving sex crimes and child abuse. She estimates that since becoming a peace officer she has investigated approximately 800 "sex" cases, of which approximately 300 were investigated while she held the rank of detective. Detective Rumsey had responsibility for investigating the allegations made by Anita A. and Dyan W. against respondent. She interviewed the patients and respondent as part of her investigation.

With respect to Detective Rumsey's interview of Anita A., Anita A.'s allegations were consistent with what the patient had previously reported.

However, Detective Rumsey noted that Dyan W.'s allegations regarding what happened had changed during the investigation. At one time Dyan W. stated that respondent had "rubbed softly between the lips of her vagina" and at another time she stated that respondent had inserted his finger in her vagina. Detective Rumsey opined that oftentimes a victim of a sex crime needs time to sort out feelings and slowly reconstruct what actually happened. However, it was not established that such a phenomenon could be used to describe why her description of what happened had varied.

The passage of time can also negatively affect recollection; it depends on the circumstances, ability to recollect, and the state of mind of the victim.

Detective Rumsey described respondent's demeanor when she interviewed him as being very vague, evasive and without confidence. Although Detective Rumsey indicated that respondent's demeanor, including his failure to make eye contact with her was suggestive of deception or guilt. In response, respondent testified that during the interview he did look the detective in the eyes but that he also looked past her because her attire allowed her upper body to be exposed, which caused him to be uncomfortable looking at her. Respondent's explanation is not convincing. Although respondent agreed to undergo a polygraph examination and, on more than one occasion, Detective Rumsey had arranged for a polygraph examiner to be available for the examination, she had difficulty getting in contact with respondent to notify him of the examination and respondent would not return her telephone calls. As a result, respondent did not undergo a polygraph examination either before or after he was arrested by Inglewood Police Department officers and charged with sexual battery.

Although Detective Rumsey videotaped her interview of respondent, unfortunately the videotape was not viewed during the hearing or offered into evidence by either party. The tape would have been helpful in evaluating testimony regarding respondent's demeanor and Detective Rumsey's appearance during the interview.

Respondent Akinbile

53. Respondent is 41 years old, married, with two young children. In November 1988, he completed his nursing studies at the Lagos State Ministry of Health School of Nursing in Lagos, Nigeria. In 1989, after graduating from nursing school, respondent practiced nursing in Nigeria for one year and in the Netherlands for eight years. Respondent subsequently relocated to Los Angeles and, after being licensed as a registered nurse in 1997, started working for a nursing registry, doing temporary staffing work. His nursing experience includes oncology, medical/surgery, geriatrics, orthopedics and telemetry.

Neither prior to September 2003 nor thereafter, had respondent been counseled or disciplined for unprofessional or inappropriate conduct with a co-worker. Prior to April 2006, respondent had never been counseled or disciplined for unprofessional or inappropriate conduct with a patient.

54. During the course of his 18-year nursing career, respondent had inserted and removed Foley catheters thousands of times, mostly involving female patients. When inserting a Foley catheter into a female patient's urethra, accepted procedure is for the nurse to don personal protective equipment, including gloves, obtain the catheter and necessary supplies, and have the patient assume an examination position with the legs spread and bent, and knees elevated. The nurse then exposes the urethra and surrounding area by spreading the patient's labium majora and labium minora with the thumb and

index finger so as to expose the patient's genitalia. This is done to allow for the application of antiseptic (on a cotton swab) and observation of any abnormalities in the genital area, which could preclude use of the catheter and/or require medical intervention. A lubricant is then applied to the tip of the catheter to allow for easier insertion. After the nurse spreads the labia and locates the opening of the urethra, the nurse can insert the catheter. Once the catheter is inserted into the urethra, the labia are released and a syringe containing saline solution is inserted into the distal end of one of the lines emanating from the Y-junction (i.e., the line that does not terminate in the urine reservoir). The syringe is used to expand a segment of the tubing near the end of the catheter so that the catheter will remain in place against the patient's bladder. The area around the urethra is then cleaned to remove the antiseptic and lubricant.

When removing the Foley catheter, accepted procedure is to deflate the tubing and again spread the labia to allow visualization of the genital area. Although the catheter could also be removed by pulling it without first spreading the labia, to do so would preclude visualization of any abnormality that may have occurred after the catheter was inserted. When removing the catheter, the upper end of the tube is pinched to prevent backflow of urine into the patient.

At no time during the accepted procedure for the insertion or removal of a Foley catheter is a care giver to place one or more of his or her fingers inside the patient's vagina.

55. Respondent notes the fact that the pudendal nerve⁴ provides for sensations around the female's pubic area, including the labia and vagina. He infers that due to referred sensation, Anita A. and Dyan W. may have mistaken or confused the spreading of their labia and the insertion/removal of a catheter to digital rubbing or insertion of a finger into their vaginas. Such an inference is not warranted.

A female's pudendal nerve branches throughout the genital area, providing for the identification of sensations in areas around the labia and inside the vagina. The pudendal nerve in a male serves the same function, in that it also branches throughout the genital area, allowing for identification of specific sites around the genitalia where sensations may be felt. It is reasonable to infer that a female will be able to distinguish the locale of

⁴ The pudendal nerve arises from the second, third, and fourth sacral nerves and divides into five branches supplying the genital structures and pelvic region. Referring to the area supplied by the pudendal nerve, the pudendum includes the external genitalia, especially of women. In a woman, it comprises the mons veneris, the labia majora, the labia minora, the vestibule of the vagina, and the vestibular glands. In a man, it comprises the penis, scrotum, and testes.

a sensation, including whether it is on the labia, inside the vagina, or at the mouth of the urethra.⁵

56. Use of a Foley catheter is generally based on a physician's order/directive. However, there are circumstances when a registered nurse could use his or her discretion as to whether a Foley catheter should be used in a specific instance, e.g., for the patient's safety. In those situations when a registered nurse has authority to exercise such discretion and elects to insert or remove a Foley catheter, the patient should be informed and agree to its use and the application of the catheter must be documented in the patient's medical records.

57. From a risk management perspective, it is prudent to have a third-party female caregiver present when a male nurse performs any procedure involving a female patient's genital area or breasts. A caregiver should also inform the patient why a particular procedure is recommended and the patient should be kept informed of what is being done during the procedure. Again, this is particularly important when it involves a patient's genital area and is especially important if a female patient has indicated to a male nurse that she would prefer treatment from a female caregiver. Respondent assumed additional risk when he did not provide for the presence of a third party female caregiver when inserting and/or removing catheters from Anita A. and Dyan W. and did not adequately inform the patients about important aspects of the procedure, as he was performing them.

Respondent's contention that there is no requirement for third parties to be present when he treats patients may be true, but acting without such support is at the nurse's own peril. The argument that the patient allegations in this matter are without merit, in part, because respondent had been a nurse for so many years and had followed the same procedures without a complaint, is non-availing. The time may come, as it has here, where a male nurse may need to defend against allegations of sexual misconduct and the presence of a third-party female caregiver who could subsequently provide her observations of what actually happened would be of the utmost importance.

58. As a result of the termination of respondent's employment at Centinela Hospital in April 2006, and the suspension of his nursing license pursuant to an ISO in July 2006, respondent has not been able to work as a registered nurse. As part of the arraignment in his criminal proceeding, the court imposed an injunction whereby he could practice nursing with male patients only. Respondent viewed such a restriction as untenable and preventing him from being employed as a registered nurse. Respondent is currently unemployed.

⁵ Pursuant to Government Code section 11425.50, subdivision (c), the Administrative Law Judge's "experience, technical competence, and specialized knowledge may be used in evaluating evidence."

59. On April 3, 2007, respondent filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. Pursuant to his Voluntary Petition for bankruptcy, respondent indicated that the debt was incurred as a small business with estimated assets and estimated liabilities, each in the amount of one million to 100 million dollars. In view of the assets and liabilities involved, the primary causal factor or factors that resulted in respondent's bankruptcy petition have not been established.

Prior to petitioning for bankruptcy, respondent had seven properties, most of which he lost due to foreclosure. He expects his remaining properties, including his home, to also be foreclosed.

60. A civil suit, brought jointly by Anita A. and Dyan W. against respondent and Daniel Freeman Hospital was filed on July 5, 2007, and is currently pending in Los Angeles Superior Court. In relevant part, the complaint seeks general, special and punitive damages based on respondent's alleged conduct while they were patients under his nursing care.

61. Two character witnesses testified on respondent's behalf. James Talabi has known respondent since they both worked at Robert F. Kennedy (RFK) Hospital in Hawthorne, California. At the time, Mr. Talabi was a security guard for the hospital. It was through respondent's encouragement that in 2003 Mr. Talabi became a licensed vocational nurse (LVN) and then continued his studies and became a registered nurse in 2005. After RFK Hospital closed, Mr. Talabi went to Centinela Hospital to work as an LVN. While there, respondent was his charge nurse. Mr. Talabi was thankful for respondent's encouragement and described respondent as a supervisor who would not allow him to "cut corners." Mr. Talabi testified that others thought well of respondent and considered him as being professional when dealing with patients.

62. Rukayat Adamson has been a registered nurse since 2002. Between 2000 and 2007, she worked at Centinela Hospital, first as a CNA and later, after being encouraged by respondent to continue her studies, as a registered nurse. Ms. Adamson considers respondent as a friend and co-worker. Actually, her family and respondent's family have been friends for approximately 10 years and remain so. She described respondent as being friendly with co-workers, insuring they were comfortable, and as someone who would pitch in to help when needed. She testified that respondent was also friendly and professional with patients and that she was not aware of any incidents involving respondent and patients. She did note, however, that respondent's attitude had changed in late 2003, after he was involved in an incident with a hospital co-worker.

63. The Board's costs of investigation and enforcement incurred through December 11, 2006, were \$26,172. Of the total amount, the board incurred \$11,259 for the investigation by the Division of Investigation of the Department of Consumer Affairs and \$14,913.25 in fees for prosecuting the matter from the Office of the Attorney General. The costs of investigation and enforcement are deemed reasonable.

LEGAL CONCLUSIONS

Jurisdiction

1. Business and Professions Code section 2750 provides, in relevant part, that every certificate holder or licensee, including licensees holding temporary licenses, or licensees holding licenses placed in an inactive status, may be disciplined by the board for violations of the Nursing Practice Act as provided in article 3 of the Nursing Practice Act (Bus. & Prof. Code, § 2750 et seq.).

2. Business and Professions Code section 2764 states:

The lapsing or suspension of a license by operation of law or by order or decision of the board or a court of law, or the voluntary surrender of a license by a licensee shall not deprive the board of jurisdiction to proceed with any investigation of or action or disciplinary proceeding against such license, or to render a decision suspending or revoking such license.

Standard of Proof

3. The standard of proof in this proceeding is "clear and convincing evidence to a reasonable certainty," meaning that complainant is obliged to adduce evidence that is clear, explicit, and unequivocal -- so clear as to leave no substantial doubt and sufficiently strong as to command the unhesitating assent of every reasonable mind. ((*Ettinger v. Bd. of Med. Quality Assurance* (1982) 135 Cal.App.3d 853; *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1893; *In Re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

4. In each of the incidents involving co-worker Christina C. and patients Anita A. and Dyan W., there were no third-party witnesses who could independently substantiate or refute respondent's conduct as alleged by the victims. As such, the credibility of each of the alleged victims and respondent are of paramount importance.

With respect to determination of witness credibility, on the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted -- but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict herself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes her may be convinced of her honesty, his integrity, his reliability. (*Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

The trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of

testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.)

The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. Disbelief does not create affirmative evidence to the contrary of that which is discarded. The fact that the trier of fact may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (See, *Hutchinson v. Contractors’ State License Bd* (1956) 143 Cal.App.2d 628, 632-633, citing *Marovich v. Central California Traction Co.* (1923) 191 Cal. 295, 304.)

When making credibility determinations in this matter, the Administrative Law Judge considered the totality of the circumstances surrounding the allegations, the content of the testimony and the demeanor of the alleged victims and respondent. To that end, Christina C. and Dyan W. were found to be more credible than respondent in describing the circumstances and events that formed the bases for discipline. On the other hand, Anita A.’s recollection and perception of events were not sufficient to establish, by clear and convincing evidence to a reasonable certainty that respondent’s conduct occurred as she had alleged. (Factual Findings 24, 25, 33, 34, 35, 36, 44, 45, 52, and 55.)

Causes for Discipline

5. Business and Professions Code section 2761, subdivision (a)(1), provides that the board may take disciplinary action against a certified or licensed nurse for unprofessional conduct, which includes, but is not limited to, gross negligence in carrying out usual certified or licensed nursing functions.

6. Unprofessional conduct is a general term that encompasses acts involving gross negligence, repeated negligent acts, incompetence, and other conduct that is related to the licensed profession that would not be done by a reasonable registered nurse under similar circumstances. Under the circumstances, a reasonable registered nurse would not have engaged in the conduct that was established by the evidence.

7. Gross negligence is “the want of even scant care or an extreme departure from the ordinary standard of conduct.” (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052-1053.)

8. Expert opinion testimony is required to prove or disprove that a registered nurse performed in accordance with the prevailing standard of care or demonstrated an

extreme departure from the standard of care. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.)

9. Although not specifically identified as complainant's "expert witness," Ms. Pfeiffer had the qualifications to testify as such. Based on her knowledge of hospital policies, the standard of care for registered nurses, and her involvement in the decision to involuntarily terminate respondent's employment at Centinela Hospital, in spite of her earlier observations of respondent and her conclusion that he had a good work ethic, Ms. Pfeiffer, in effect, represented that respondent's conduct constituted an extreme departure from the standard of care.

10. Respondent is subject to disciplinary action under Business and Professions Code section 2761, subdivision (a)(1), for unprofessional conduct, in that he inappropriately touched the breast of co-worker Christina C. and the genital area of patient Dyan W. (Factual Findings 13, 14, 16, 20, 21, 38, 39, 40, 41, 42, 49 and 50.)

11. Business and Professions Code section 726 states, in relevant part: "The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under [the Department of Consumer Affairs]."

12. Respondent is subject to disciplinary action under Business and Professions Code section 726, for sexual misconduct with patient Dyan W. (Factual Findings 38, 39, 40, 41, and 42 and 49.)

13. Business and Professions Code section 2761, subdivision (d), provides that the board may take disciplinary action against a certified or licensed nurse for "violating or attempting to violate, directly or indirectly . . . any provision or term of [the Nursing Practice Act] or regulations adopted pursuant to it."

14. Respondent is subject to disciplinary action under Code section 2761, subdivision (d), for violating provisions of the Nursing Practice Act, as set forth in Legal Conclusion 10. (Factual Findings 13, 14, 16, 20, 21, 38, 39, 40, 41, 42, 49 and 50.)

15. The purpose of licensing statutes and administrative proceedings enforcing licensing requirements is not penal but public protection. (*Hughes, supra*, 17 Cal.4th at 784-786; *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d 1471, 1476.) All evidence presented by respondent in his defense has been considered. While the evidence was not sufficient to negate all the allegations, some of the evidence may be considered in establishing the appropriate level of discipline. In this matter, cause for discipline was established for one of the two complaining patients. Even if both complaints were established, they occurred within a period of a few weeks, with no prior or subsequent complaints by patients. While respondent's conduct with Christina C. was unprofessional and was related to the qualifications, functions and duties of a registered nurse, it alone would not be a ground for outright revocation of respondent's nurse's

license. With respect to sexual abuse of a patient by a registered nurse, there is rarely a grey area that can justify stayed revocation and a period of probation.

16. Pursuant the board's Disciplinary Guidelines⁶, the Administrative Law Judge should carefully consider the totality of the facts and circumstances in each individual case, and clearly delineate the factual basis for his proposed decision. Safety of the public is paramount.

If, at the time of hearing, the Administrative Law Judge finds that the respondent for any reason is not capable of safe practice, the board favors outright revocation of the license. If, however, the respondent has demonstrated a capacity to practice safe nursing, a stayed revocation order with probation is recommended.

In determining whether revocation, suspension or probation is to be imposed in a given case, the Administrative Law Judge should consider factors including, but not limited to the nature and severity of the acts/offenses under consideration, actual or potential harm to the public and/or any patient, the nurse's prior disciplinary record, the number and variety of current violations, and evidence pertaining to mitigation and/or rehabilitation.

17. Given the lengthy period during which respondent practiced nursing without complaints and in consideration of his past promotion/appointment to supervisory nursing positions, he has demonstrated that he is capable of safe practice. However, the nature of his violation of Business and Professions Code section 726 is serious and the Disciplinary Guidelines proposes only outright license revocation as the recommended discipline. Respondent maintains that he did not engage in any of the unprofessional conduct as alleged by Christina C., Anita A. and Dyan W. However, after Christina C. reported her incident, which resulted in respondent being counseled, respondent changed the way he interacted with co-workers, started exercising extra care in the workplace, and advised others whom he mentored to do likewise. Considering all that has happened to respondent, including his criminal trial and this administrative proceeding, it is unlikely that respondent will be a repeat offender. License revocation is warranted; however, provision should be made for respondent to petition for reinstatement of his registered nurse's license after a period of only one year.

Cost Recovery

18. Business and Professions Code section 125.3 states, in pertinent part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the [Department of Consumer Affairs] . . . upon request of the entity bringing the proceeding

⁶ Board of Registered Nursing "Recommended Guidelines for Disciplinary Orders and Conditions of Probation" (10/02). (See, Cal. Code Regs., tit. 16, § 1444.5.)

may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

[¶] . . . [¶]

(c) . . . The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a). . . .

20. In this matter, complainant has established that respondent's license is subject to discipline for all three causes for discipline contained in the First Amended Accusation and that the total costs for investigation and enforcement of the case, which is deemed reasonable, is \$26,172. (Factual Finding 63.)

21. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to Business and Professions Code section 125.3. In so doing, however, the Court directed the Administrative Law Judge and the board to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, the board must not assess the full costs where it would unfairly penalize a respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the board must consider a respondent's subjective good faith belief in the merits of his or her position and whether that respondent has raised a colorable challenge; the board must consider a respondent's ability to pay; and the board may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. (*Zuckerman, supra* at 45.) In light of respondent's subjective good faith belief in the merits of his position and the colorable challenge he raised in defense, respondent's reduced earning power since the suspension of his registered nursing license, and severity of the below Order, and in consideration of respondent's pending bankruptcy petition, it would be unduly punitive to require respondent to pay the entirety of the board's reasonably incurred costs. Rather, the sum of \$13,000 is deemed an appropriate amount for respondent to pay the board for its costs, provided that the board defers payment of that amount as a condition precedent to reinstatement of respondent's registered nurse's license at some point in the future. (Factual Findings 58, 59, 60 and 63.)

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ORDER

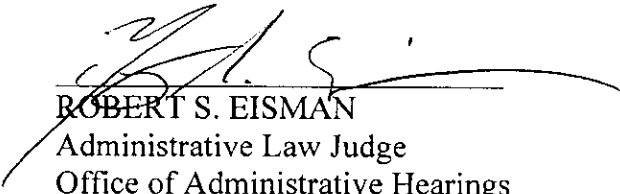
WHEREFORE, THE FOLLOWING ORDER is hereby made:

Registered Nurse License Number 533166, issued to Morufu Oladipupo Akinbile, is hereby revoked.

Respondent may petition for reinstatement of his registered nurse's license after a period of one (1) year from the effective date of this Order.

If and when respondent's license is to be reinstated, as precondition of license reinstatement, respondent shall pay to the Board of Registered Nursing costs associated with its investigation and enforcement, pursuant to Business and Professions Code section 125.3, in the amount of \$13,000.00. Respondent shall be permitted to pay these costs in a payment plan approved by the Board. Nothing in this provision shall be construed to prohibit the board from reducing the amount of cost recovery.

March 26, 2008.



ROBERT S. EISMAN

Administrative Law Judge
Office of Administrative Hearings

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**BEFORE THE
BOARD OF REGISTERED NURSING
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

MORUFU OLADIPUPO AKINBILE

419 East Moorehaven Drive
Carson, California 90746

Registered Nurse License No. 533166,

Respondent.

Case No. 2007-46

OAH No. L-2006090408

**FIRST-AMENDED
ACCUSATION**

Complainant alleges:

PARTIES

1. Ruth Ann Terry, M.P.H., R.N. (Complainant) brings this First-Amended Accusation solely in her official capacity as the Executive Officer of the Board of Registered Nursing (Board), Department of Consumer Affairs, State of California.

2. The Board is the state agency charged with administering and enforcing the statutes and regulations governing the practice of licensed registered nurses in the State of California.

3. On or about June 25, 1997, the Board of Registered Nursing issued Registered Nurse License Number 533166 to Morufu Oladipupo Akinbile (Respondent). The

1 Registered Nurse License was in full force and effect at all times relevant to the charges brought
2 herein, until it was suspended effective July 19, 2006, pursuant to the Interim Suspension Order
3 issued in Office of Administrative Hearings Case No. L-2006070435. The license expired on
4 August 31, 2006, while suspended and without being renewed.

5 **JURISDICTION**

6 4. This First-Amended Accusation is brought before the Board under the
7 authority of the following laws. All section references are to the Business and Professions Code
8 unless otherwise indicated.

9 5. Section 2750 of the Business and Professions Code (Code) provides, in
10 pertinent part, that the Board may discipline any licensee, including a licensee holding a
11 temporary or an inactive license, for any reason provided in Article 3 (commencing with section
12 2750) of the Nursing Practice Act.

13 6. Section 2764 of the Code provides, in pertinent part, that the expiration or
14 suspension of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary
15 proceeding against the licensee or to render a decision imposing discipline on the license. Under
16 Code section 2811, subdivision (b), the Board may renew an expired license at any time within
17 eight years after its expiration.

18 7. Section 2761 of the Code provides in pertinent part:

19 "The board may take disciplinary action against a certified or licensed nurse or
20 deny an application for a certificate or license for any of the following:

21 "(a) Unprofessional conduct,"

22 "(d) Violating or attempting to violate, directly or indirectly, or assisting in or
23 abetting the violating of, or conspiring to violate any provision or term of this chapter [the
24 Nursing Practice Act] or regulations adopted pursuant to it."

25 8. Section 726 of the Code provides, in pertinent part, that "[t]he commission
26 of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes
27 unprofessional conduct and grounds for disciplinary action for any person licensed under this

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1 division, under any initiative act referred to in this division and under Chapter 17 (commencing
2 with Section 9000) of Division 3.”

3 9. Business and Professions Code section 125.3 states that:

4 (a) “Except as otherwise provided by law, in any order issued in resolution of a
5 disciplinary proceeding before any board within the department [of Consumer Affairs] . . . , the
6 board may request the administrative law judge to direct a licensee found to have committed a
7 violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the
8 investigation and enforcement of the case.

9 (b)

10 (c) A certified copy of the actual costs, or a good faith estimate of costs where
11 actual costs are not available, signed by the entity bringing the proceeding or its designated
12 representative shall be prima facie evidence of reasonable costs of investigation and prosecution
13 of the case. The costs shall include the amount of investigative and enforcement costs up to the
14 date of the hearing, including, but not limited to, charges imposed by the Attorney General.”

15 **FACTUAL ALLEGATIONS**

16 **Co-Worker Christina C.**

17 10. On or about June 4, 2003, respondent began working at the Centinela Freeman
18 Regional Medical Center as a registered nurse. On or about September 2, 2003, as the result of
19 an incident that had occurred a few days earlier, respondent was counseled to avoid all physical
20 contact with his co-workers and to read the hospital’s policies on employee conduct. The
21 circumstances are as follows:

22 A. Christina C., a certified nurse assistant, had told respondent on several
23 occasions that she was married and not interested in dating him. In late August 2003, she and
24 respondent were working the night shift on the sixth floor of the medical center. Christina C.
25 was pregnant at the time. Sometime between midnight and 2:00 a.m., when she took her lunch
26 break in the break room, respondent entered the room, started talking to her about her pregnancy,
27 told her she should be having his baby, and caressed her right breast. Christina C. started crying.
28 Respondent then shut the door to the break room and apologized.

1 B. Christina C. reported the incident to her supervisor and to the nursing
2 supervisor. Respondent denied touching Christina C.'s breast but admitted kissing her on the
3 cheek while complimenting her.

4 Patient A.

5 11. On or about April 3, 2006, while working as a Registered Nurse at
6 Centinela Freeman Regional Medical Center, respondent entered the hospital room assigned to
7 Patient A., introduced himself, and told her he would be her nurse for the night. He checked her
8 vital signs and told her that because she had had angioplasty, he had to check her "private area."
9 Respondent then placed his hand under the patient's hospital gown and inserted two or three of
10 his fingers into her vagina. The patient told him to get his hand out of there. Respondent did so
11 and left the room.

12 Patient B.

13 12. On or about April 19, 2006, at approximately 9:00 p.m., while working as
14 a Registered Nurse at Centinela Freeman Regional Medical Center, respondent entered the
15 hospital room of patient B. and introduced himself as a nurse. He stated that he would remove
16 her urinary catheter and insert an intravenous (IV) needle into her arm. The patient stated she
17 would prefer a female nurse. Nonetheless, respondent put on hospital gloves, removed the
18 catheter and then fondled her vagina with his fingers. He then inserted an IV into her right arm.
19 Respondent returned to the patient's room at approximately 11:45 p.m. He directed her to use
20 the restroom because of the catheter removal. He then asked her a number of personal questions
21 about her family life. Respondent rubbed the patient's face with his hands. Next he told her her
22 heart monitor was loose and he needed to adjust the leads. Respondent then slipped his hands
23 under the patient's hospital gown and began rubbing the nipples on each of her breasts as he
24 attached the monitor leads. Respondent then moved his right hand to the patient's vagina and
25 began rubbing her. Respondent was not wearing any gloves. The patient asked respondent what
26 he was doing and demanded he remove his hands. Respondent did so and wrote his personal
27 phone number on a green piece of paper that was on the bedside table. Respondent suggested to
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1 the patient that she call him when she was discharged from the hospital. No one else was in the
2 room during the incident.

3 13. Respondent admitted that Patient B was assigned to his care on April 19, 2006,
4 and that he inserted her IV and removed her urinary catheter. Respondent admitted that he wrote
5 his personal cell phone number (310/ 654-3440) on a piece of paper that was on the patient's
6 bedside table.

7 14. Centinela Freeman Regional Medical Center has a policy prohibiting
8 unprofessional relationships between nursing staff and patients. The policy is stated in the
9 *Employee Handbook*, a copy of which was given to respondent when he commenced work.

10 15. Centinela Freeman Regional Medical Center received and investigated the
11 complaints it received regarding respondent's conduct with patients "A" and "B." The Center
12 terminated respondent's employment effective April 26, 2006.

13 FIRST CAUSE FOR DISCIPLINE

14 (Unprofessional Conduct)

15 16. Respondent is subject to disciplinary action under Code section 2761,
16 subdivision (a)(1), for unprofessional conduct, for her inappropriate touching of two patients and
17 one co-worker. The circumstances are as follows:

18 A. The matters alleged in paragraphs 10 through 15 are realleged and
19 incorporated herein by reference as though fully set forth.

20 B. Respondent inserted his fingers into the vagina of one patient.

21 C. Respondent also inappropriately touched another patient and gave her his
22 personal phone number.

23 D. Respondent inappropriately grabbed the breast of an employee after she
24 had let him know she was married and had no interest in dating him.

25 SECOND CAUSE FOR DISCIPLINE

26 (Sexual Misconduct with Patient)

27 17. Respondent is subject to disciplinary action under Code section 726, for

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1 sexual misconduct with two patients, as set forth more fully in paragraphs 11 through 16 above
2 and incorporated herein by reference as though set forth in full.

3 **THIRD CAUSE FOR DISCIPLINE**

4 **(Violating Provisions of Nursing Practice Act)**

5 18. Respondent is subject to disciplinary action under Code section 2761,
6 subdivision (d), for violating provisions of the Nursing Practice Act, as set forth more fully in
7 paragraphs 10 through 17 above and incorporated herein by reference as though set forth in full.

8
9 **PRAYER**


10 WHEREFORE, Complainant requests that a hearing be held on the matters herein
11 alleged, and that following the hearing, the Board of Registered Nursing issue a decision:

12 1. Revoking or suspending Registered Nurse License Number 3166, issued
13 to Morufu Oladipupo Akinbile.

14 2. Ordering Morufu Oladipupo Akinbile to pay the Board of Registered
15 Nursing the reasonable costs of the investigation and enforcement of this case, pursuant to
16 Business and Professions Code section 125.3; and

17 3. Taking such other and further action as deemed necessary and proper.

18
19 DATED: December 17 2007

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21 
22 *for* RUTH ANN TERRY, M.P.H., R.N.
23 Executive Officer
24 Board of Registered Nursing
25 State of California
26 Complainant
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